

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,	)	
	)	
Petitioner,	)	4:19CV3005
	)	
v.	)	
	)	
STATE OF NEBRASKA,	)	MEMORANDUM AND ORDER
	)	
Respondent.	)	
_____	)	

Justin Gardner has failed to respond to the Respondent's Motion for Summary Judgment (filing no. 9; filing no. 10; filing no. 11) alleging that his habeas corpus petition is premature in that he has not exhausted his state remedies and in fact is pursuing a direct appeal in the state courts at this time. I find and conclude that there are no material facts in dispute, and that Petitioner has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b)(1)(A). After taking judicial notice of state court records (filing no. 10), I now dismiss this action without prejudice because it is premature and the claims are unexhausted but may subsequently become exhausted on the merits.

Finally, a petitioner cannot appeal an adverse ruling on his petition for writ of habeas corpus under § 2254 unless he is granted a certificate of appealability. 28 U.S.C. § 2253(c)(1); 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1). The standards for certificates (1) where the district court reaches the merits or (2) where the district court rules on procedural grounds are set forth in *Slack v. McDaniel*, 529 U.S. 473, 484-485 (2000). I have applied the appropriate standard and determined that Petitioner is not entitled to a certificate of appealability.

IT IS ORDERED that the habeas corpus petition (filing no. 1) is denied and dismissed *without prejudice*. The Motion for Summary Judgment (filing no. 9) is

granted as provided herein. No certificate of appealability has been or will be issued. Judgment will be issued by separate document.

DATED this 8<sup>th</sup> day of May, 2019.

BY THE COURT:

*s/ Richard G. Kopf*  
Senior United States District Judge